No. 97-1008

In The

Supreme Court of the United States

October Term, 1997

CAROLYN C. CLEVELAND,

Petitioner,

vs.

POLICY MANAGEMENT SYSTEMS CORP.; GENERAL INFORMATION SERVICES, a Division of Policy Management Systems Corporation; and CYBERTEK CORP.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Whether the Court of Appeals appropriately affirmed summary judgment denying a claim under the Americans with Disabilities Act, holding that the application for or receipt of social security disability benefits creates a rebuttable presumption that the claimant is judicially estopped from asserting that he or she is a "qualified individual with a disability," and that the claimant in this case, who continuously and unequivocally represented to the Social Security Administration that she was disabled and completely unable to work, failed to raise a genuine issue as to the existence of any material fact which would rebut the presumption.

LIST OF PARTIES

The names of all parties appear in the caption of this case.

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The opinion of the United States Court of Appeals for the Fifth Circuit, reported at 120 F.3d 513 (5th Cir. 1997), affirmed the decision of the United States District Court for the Northern District of Texas, which granted summary judgment in favor of the Respondents on September 6, 1996. The Fifth Circuit denied Petitioner's Petition for Rehearing on September 15, 1997.

JURISDICTION

The Court of Appeals affirmed the District Court's judgment on August 14, 1997. Petition for Rehearing and Suggestion for Rehearing En Banc were denied by the Court of Appeals on September 15, 1997. This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(1) (1993). The Court of Appeals had jurisdiction of this matter under 28 U.S.C. § 1291 (1993), as an appeal from a final judgment of the District Court. The District Court had jurisdiction to hear the merits of Petitioner's claims under 28 U.S.C. § 1331 (1993).

STATEMENT OF THE CASE

Carolyn Cleveland ("Cleveland") brought this action against her former employer Policy Management Systems

Corporation ("PMSC")[1] claiming that she was terminated in violation of the Americans With Disabilities Act.

Cleveland was hired by PMSC on August 30, 1993, to perform telephonic background checks on prospective employees of PMSC's clients. (R.I 86-87). On January 7, 1994, Cleveland had a stroke[2] and took a leave of absence from PMSC. (R.I 88). On January 21, 1994, Cleveland filed for Social Security disability benefits and specifically represented to the Social Security Administration that she had a disabling condition dating from January 7, 1994. (R.II 387, 394).

On January 26, 1994, Cleveland signed a formal application for Social Security disability benefits and specifically stated the following:

> I became unable to work because of my disabling condition on January 7, 1994.
>
> I am still disabled.
>
> I know that anyone who makes or causes to be made a false statement or representation of material fact in an application or for use in determining a right to payment under the Social Security Act commits a crime. . . . I affirm that all information I have given in connection with this claim is true.

(R.II 394-397).

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[1] Cleveland also sued General Information Systems ("GIS") and Cybertek. GIS was never a separate entity from PMSC and Cleveland never worked for Cybertek. (R.I 5)

[2] Cleveland states she suffered a stroke "during the course and scope of her employment." Petition p. 4. While Cleveland may have had a stroke while working, there is no evidence that her stroke was caused by her work.

Cleveland also executed at that time a medical authorization to enable the Social Security Administration to obtain information to "evaluate my claim for benefits under the Social Security Act." (R.II 398). Cleveland continued to supply information in support of her claim for disability benefits, and, in March of 1994, provided a Supplemental Questionnaire and vocational report to the Social Security Administration. (R.II 399-408).

On April 11, 1994, Cleveland returned to her job, working only half days. (R.I 88). On April 25, 1994, she returned to full duty. (R.I 88). Meanwhile, the Social Security Administration forwarded Cleveland's claim to the Texas Rehabilitation Commission ("TRC"), which requested additional information from Cleveland on April 20, 1994. (R.II 409). After the TRC attempted to contact Cleveland to obtain information about her claim, she informed the TRC that she returned to work in April. (R.II 409). The Social Security Administration's file does not contain any requests from Cleveland in which she withdrew her claim for benefits or asserted that she did not have a disability. (R.II 56-386).

Despite numerous attempts to help Cleveland and to train her, she could not perform her job. (R.II 14, 254). On July 15, 1994, Cleveland was terminated for poor job performance.[3] (R.I 91).

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[3] PMSC denies any implication by Cleveland that she was terminated "because of her condition." Petition p. 7. Cleveland was terminated not because she had a stroke, but simply because of poor job performance. (R.I 91)

On July 11, 1994, the Social Security Administration denied Cleveland's request for benefits. (R.II 136, 142). On September 14, 1994, Cleveland filed a Request for Reconsideration and represented to the Social Security Administration "I disagree with the determination made on my disability. . . . I continue to be disabled." (R.II 414). Cleveland's statement that she "continue[d]" to be disabled is consistent with her representations that she was disabled beginning January 7, 1994, and not just since termination.[4]

On September 20, 1994, Cleveland filed a form with the Social Security Administration stating that she "worked 3 months or less and stopped because of my injury or illness." (R.II 416). She also stated in her own handwriting that she was terminated "because I could no longer do the job because of my condition." (R.II 417).

In September 1994, Cleveland's neurologist, Dr. Steven Herzog, stated that Cleveland "suffered with a stroke on 1/7/94 causing aphasia. This has produced complete disability." (R.II 314). Dr. Herzog classified Cleveland as "100% disabled."[5] (R.II 314). Dr. Herzog's

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[4] Cleveland's Petition asserts that "[i]t was only after, and as a result of, the termination (which caused the worsening of her condition) that Cleveland actively pursued and received Social Security disability benefits." Petition p. 11. The record consistently proves that Cleveland uniformly stated that her disability began on the date of her stroke, January 7, 1994, not some time after her termination from PMSC. (R.II 394-397, 417, 421). As a result, Cleveland was awarded benefits retroactive to January 7, 1994. (R.II 434).

[5] Cleveland contends that Dr. Herzog expected her to recover completely. However, none of the information Dr. Herzog produced to the Social Security Administration indicates that Cleveland was expected to fully recover. (R.II 56-386).

records were provided to the Social Security Administration. (R.II 314).

On November 11, 1994, Cleveland stated to Cary Conaway, Ph.D. of the TRC that she was at the examination "[t]o get my disability." "When asked why she had applied for disability benefits, Ms. Cleveland responded, 'I had a stroke in January 1994; I went back to work but I couldn't work.' " (R.II 421). On November 30, 1994, the Social Security Administration denied Cleveland's request for benefits. (R.II 219, 224).

On January 1, 1995, Cleveland signed a further Request for Reconsideration to the Social Security Administration stating that "I am unable to work due to my disability." (R.II 430).

On May 10, 1995, Cleveland requested a hearing in front of an Administrative Law Judge representing "I am unable to work due to my disability." (R.II 433).

On May 12, 1995, Cleveland's treating physician, Bob L. Gant, stated, "I believe this patient is permanently and completely disabled from any productive work." (R.II 75). These records were provided to the Social Security Administration. (R.II 75).

On September 29, 1995, the Administrative Law Judge, Harold G. Adams, concluded that Cleveland "became disabled on January 7, 1994 and continues to be disabled through the date of this decision." (R.II 434). He

further ordered that "the claimant is entitled to a period of disability commencing January 7, 1994. . . . " (R.II 434-35).

All of Cleveland's representations to the Social Security Administration indicate that she is disabled and that, despite her brief attempt, she could not work. (R.II 56-386). Cleveland consistently stated that her disability began in January 1994. (R.II 56-386). She never stated to the Social Security Administration that her disability began after her termination from PMSC. (R.II 56-386).

The Fifth Circuit found that Cleveland continuously, unambiguously and unequivocally represented to the Social Security Administration that she is totally disabled and unable to work. *Cleveland v. Policy Management Systems Corp.*, 120 F.3d 513, 518 (5th Cir. 1997). Because of these representations (and the absence of proof to the contrary), Cleveland was unable to overcome the rebuttable presumption that she was able to perform the essential functions of her job. *Id.* at 518-19. Therefore, Cleveland could not establish a prima facie case under the Americans With Disabilities Act. *Id.* As the Fifth Circuit noted, in order to prove that she could perform the essential functions of her job, Cleveland would have to disavow her previous sworn representations creating "a factual impossibility and a legal contradiction." *Id.*

REASONS FOR DENYING THE WRIT

The Circuit Courts of Appeal which have considered the issue before the Court unanimously agree that a claimant's sworn assertions made to the Social Security

Administration ("SSA") are relevant in assessing whether he is a qualified individual with a disability under the Americans With Disabilities Act ("ADA"). Even those Circuits reluctant to hold that the claimant is "judicially estopped" from asserting that he can perform the essential functions of his job because of inconsistent statements to the SSA, acknowledge that the claimant's assertions are relevant, material evidence in determining whether the claimant can establish a prima facie case. Regardless of whether the court applies judicial estoppel or simply uses a traditional summary judgment analysis, the Circuits uniformly make their decisions based upon the claimant's assertions in light of all of the available evidence.

Further, each court considers the claimant's assertions and decides on a case by case basis whether the assertions are strong enough to preclude him from establishing that he can perform the essential functions of his job. Each case turns upon what representations were made to whom, when, and for what purpose. After reviewing the content and context of the statements, each court must determine whether the representations preclude a finding that the individual was capable of performing the essential functions of his job at the time of the alleged discrimination. Thus, review by this Court of the present case will not eradicate the need in the future for the case by case factual analysis employed to resolve this and similar claims.

The Fifth Circuit's decision is reasonable and appropriate. The court recognized the inconsistency in being totally disabled and unable to work, yet simultaneously able to perform the essential functions of the job. The

court also recognized that in some situations a Social Security disability recipient could be capable of performing the essential functions of his job. Thus, the court declined to adopt a per se bar resulting from an application for or receipt of disability benefits, and instead held that such application or receipt creates a rebuttable presumption that the recipient is judicially estopped from claiming that he is a qualified individual with a disability. In this case, the Fifth Circuit analyzed Cleveland's representations in the context of all of the summary judgment evidence. Because the Fifth Circuit assumed that Cleveland truthfully represented her complete and total inability to work to the SSA, she was unable to overcome the rebuttable presumption created by her consistent and unambiguous representations. The Fifth Circuit's opinion protects the integrity of the justice system while insuring that a claimant who has not made inconsistent representations can proceed with an ADA claim.

I. The Circuit Split is More Form Than Substance.

Virtually all Circuit Courts of Appeal have considered the impact a claimant's representations to the SSA or similar entities have on an ADA claim.[6] While on the

[6] *See, e.g., August v. Offices Unlimited, Inc.*, 981 F.2d 576 (1st Cir. 1992); *McNemar v. The Disney Store, Inc.*, 91 F.3d 610, 619 (3rd Cir. 1996), *cert denied*, 117 S. Ct. 958 (1997); *Cleveland v. Policy Management Systems Corp.*, 120 F.3d 513, 518 (5th Cir. 1997); *Griffith v. Wal-Mart Stores*, No. 96-6361, 1998 WL 29870 (6th Cir. 1998); *Weigel v. Target Stores*, 122 F.3d 461 (7th Cir. 1997); *Dush v. Appleton Electric Co.*, 124 F.3d 957 (8th Cir. 1997); *Kennedy v. Applause, Inc.*, 90 F.3d 1477 (9th Cir. 1996); *Talavera v. School Board of Palm Beach County*, 129 F.3d 1214 (11th Cir. 1997); *Swanks v. Washington Metropolitan Transit Authority*, 116 F.3d 582 (D.C. Cir. 1997); *see also Simon v. Safelite Glass Corp.*, 128 F.3d 68 (2nd Cir. 1997) (Deciding the impact a claimant's representations to the SSA have on an ADEA claim.).

surface there may appear to be a Circuit split, the split is more form than substance. Specifically, the Circuits agree on the three key issues. First, application or receipt of Social Security disability benefits does not create a per se bar which would automatically prohibit a claimant from establishing that he can perform the essential functions of his job.[7] Second, a claimant's representations to the SSA are material and relevant in assessing whether he is a qualified individual with a disability.[8] Third, a claimant's representations to the SSA can be so strong and persuasive that summary judgment for the employer is appropriate.[9] Therefore, while courts use different labels in

[7] *See, e.g., D'Aprile v. Fleet Services Corp.*, 92 F.3d 1, 5 (1st Cir. 1996); *Krouse v. American Sterilizer Co.*, 126 F.3d 494, 503 n.5 (3rd Cir. 1997); *Cleveland*, 120 F.3d at 517; *Griffith v. Wal-Mart Stores*, No. 96-6361, 1998 WL 29870 (6th Cir. 1998); *Weigel*, 122 F.3d at 467; *Dush*, 124 F.3d at 960; *Kennedy*, 90 F.3d at 1481 n.3; *Talavera*, 129 F.3d at 1220; *Swanks*, 116 F.3d at 583. *See also Simon*, 128 F.3d at 72-73.

[8] *See, e.g., August*, 981 F.2d at 581-82; *McNemar*, 91 F.3d at 618; *Cleveland*, 120 F.3d at 516; *Griffith v. Wal-Mart Stores*, No. 96-6361, 1998 WL 29870 (6th Cir. 1998); *Weigel*, 122 F.3d at 467-68; *Dush*, 124 F.3d at 963; *Kennedy*, 90 F.3d at 1481; *Talavera*, 129 F.3d at 1220; *Swanks*, 116 F.3d at 587. *See also Simon*, 128 F.3d at 72.

[9] *See, e.g., August*, 981 F.2d at 582; *McNemar*, 91 F.3d at 619; *Cleveland*, 120 F.3d at 519; *Griffith v. Wal-Mart Stores*, No. 96-6361, 1998 WL 29870 (6th Cir. 1998); *Weigel*, 122 F.3d at 469; *Dush*, 124 F.3d at 963; *Kennedy*, 90 F.3d at 1482; *Talavera*, 129 F.3d at 1220; *Swanks*, 116 F.3d at 587. *See also Simon*, 128 F.3d at 74.

their case analysis, they agree on the essential components for the factual examination of each case.[10]

Most of the Circuits have been asked to decide whether a claimant who has, under penalty of perjury, represented that he is totally disabled, or unable to work, or made any other similar statements, can simultaneously establish that he is capable of performing the essential functions of his job. The Circuits have unanimously held that the outcome depends upon the claimant's representations in the factual context of each case. *See, e.g., Dush v. Appleton Electric Co.*, 124 F.3d 957, 965 (8th Cir. 1997) (ADA plaintiff who had characterized herself as totally disabled in a previous workers' compensation proceeding failed to present evidence showing that she was a qualified individual with a disability.) The Circuits agree that the representations a claimant makes in order to receive disability benefits are relevant, material evidence in determining whether the claimant can establish a prima facie case under the ADA.[11] *See Talavera v. School Board of*

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[10] The EEOC agrees that a claimant's representations made in connection with an application for benefits are relevant to the determination of whether a person is a qualified individual with a disability. The EEOC does not, however, believe that such representations should be determinative. Under the EEOC's guidelines, it is inconceivable that summary judgment would ever be appropriate, no matter how strong the inconsistent representation. EEOC Enforcement Guidance on the Effect of Representations Made in Applications for Benefits on the Determination of Whether a Person is a "Qualified Individual with A Disability" Under The Americans With Disabilities Act of 1990 at 1, 10 (Feb. 12, 1997).

[11] To establish a prima facie case under the ADA, a claimant must prove (1) that she was disabled within the meaning of the ADA, (2) that her work performance met her employer's legitimate expectations, (3) that she was discharged [or subjected to some other adverse employment action], and (4) that the circumstances surrounding [the adverse action] indicate that it is more likely than not that her disability was the reason for these adverse actions." *Weigel v. Target Stores*, 122 F.3d 461, 465 (7th Cir. 1997) (quoting *Leffel v. Valley Financial Services*, 113 F.3d 787, 792-94 (7th Cir.), *cert. denied*, 118 S. Ct. 416 (1997)).

Palm Beach County, 129 F.3d 1214, 1220-21 (11th Cir. 1997) ("Whether in any particular situation there is an inconsistency between applying for SSD benefits and bringing an ADA claim will depend upon the facts of the case, including the specific representations made in the application for disability benefits and the nature and extent of the medical evidence in the record."); *Swanks v. Washington Metropolitan Area Transit Authority*, 116 F.3d 582, 587 (D.C. Cir. 1997) (Claimant's statements in support of disability claims are relevant in ADA suits.). Accordingly, many Circuits have held that prior inconsistent representations defeat an ADA claim. *See, e.g., Dush v. Appleton Electric Co.*, 124 F.3d 957, 963 (8th Cir. 1997) ("The burden faced by ADA claimants in this position is, by their own making, particularly cumbersome, for summary judgment should issue unless there is 'strong countervailing evidence that the employee . . . is, in fact, qualified.' ") (quoting, *Mohamed v. Marriott International, Inc.*, 944 F. Supp. 277, 281-84 (S.D.N.Y. 1996)). With or without "judicial estoppel," or other labels, the Circuits have adopted the same approach of close factual analysis, leading to results which, if different, are explained by distinctions of fact. *Compare August v. Offices Unlimited, Inc.*, 981 F.2d 576, 579-81 (1st Cir. 1992) (Without specifically using

judicial estoppel, summary judgment upheld because claimant stated that he was disabled and unable to work beginning before he requested accommodation.); *Simon v. Safelite Glass Corp.*, 128 F.3d 68, 74 (2nd Cir.) (Judicial estoppel used to uphold summary judgment because claimant said he was disabled at the time he was terminated.), *with D'Aprile v. Fleet Services Corp.*, 92 F.3d 1, 4-5 (1st Cir. 1996) (Summary judgment not appropriate because representations were not inconsistent with ADA claim and claimant did not represent that she was disabled prior to the adverse employment decision.). *See also, McNemar v. The Disney Store*, 91 F.3d 610, 619 (3rd Cir. 1996), *cert. denied*, 117 S. Ct. 958 (1997) (Judicial estoppel applied to uphold summary judgment when a claimant represented, under penalty of perjury, that he was disabled and unable to work and his disability began before any adverse employment decision.); *Kennedy v. Applause, Inc.*, 90 F.3d 1477, 1480-82 n.3 (9th Cir. 1996) (Summary judgment proper without specifically utilizing judicial estoppel because Kennedy and her doctor had represented that she was totally disabled. Thus, "there was no genuine issue that she could have performed her job with the proposed, or any other, reasonable accommodation.").

Many courts have compared the statutory language in the ADA with the Social Security Act. *See, e.g., Weigel v. Target Stores*, 122 F.3d 461, 465-66 (7th Cir. 1997). To prevail under the ADA, the claimant must prove that he is a "qualified individual with a disability." 42 U.S.C. § 12112(a) (1995). To be a qualified individual with a disability, the claimant must prove that he can perform

the essential functions of his job with or without reasonable accommodation. *Id.* at § 12111(8).[12] Under the Social Security Act, an individual may receive benefits if he is unable "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment" that is expected to last for a continuous period of twelve months or will result in death. 42 U.S.C. § 423(d)(1)(A) (Supp. 1997). Further, the impairment must prohibit the recipient from performing his previous work or engaging in any other kind of substantial gainful work which exists in the national economy. 42 U.S.C. § 423(d)(2)(A) (Supp. 1997). The assertion by a claimant that he is simultaneously "capable of performing the essential functions of his job" yet incapable of "working in the national economy" is logically inconsistent. *See Cleveland v. Policy Management Systems Corp.*, 120 F.3d 513, 518 (5th Cir. 1997); *McNemar v. The Disney Store*, 91 F.3d 610, 618 (3rd Cir. 1996), *cert. denied*, 117 S. Ct. 958 (1997). Nevertheless, because the Social Security Act does not consider reasonable accommodation, and the ADA does, most courts have concluded that whether a Social Security disability recipient can establish a prima facie case under the ADA depends upon the content and context of the assertions. *See Dush v. Appleton Electric Co.*, 124 F.3d 957, 961, 963 (8th Cir. 1997) (Summary judgment proper because claimant told workers' compensation court that she was totally disabled and unemployable as of the date

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[12] The ADA does not protect those who cannot do their jobs. *See McNemar v. The Disney Store, Inc.*, 91 F.3d 610, 618 (3rd Cir. 1996), *cert denied*, 117 S. Ct. 958 (1997) ("A person unable to work is not intended to be, and is not, covered by the ADA.")

of her discharge.); *Weigel v. Target Stores*, 122 F.3d 461, 463, 468 (7th Cir. 1997) (Claimant's representation that she was "wholly unable to work" and her doctor's assertions that she was "totally disabled" were sufficient to uphold summary judgment.)

The Circuits have unanimously declined to adopt a per se bar.[13] Thus, a claimant's application for and receipt of Social Security disability benefits does not automatically disqualify him from ADA protection. Because of the distinctions between the ADA and the Social Security Act, the Circuits focus on the representations the claimant and his witnesses made to enable him to receive Social Security or other disability benefits. *See Talavera v. School Board of Palm Beach County*, 129 F.3d 1214, 1220 (11th Cir. 1997) ("[A]n ADA plaintiff should not be permitted to disavow any statements she made in order to obtain SSD benefits.") Often, the claimant's representations are so

[13] Many courts assumed that the Third Circuit adopted a per se bar in *McNemar v. The Disney Store*, 91 F.3d 610, 619 (3rd Cir. 1996), *cert. denied*, 117 S. Ct. 958 (1997). *See, e.g., Dush v. Appleton Electric Co.*, 124 F.3d 957, 961 (8th Cir. 1997) (stating that the Third Circuit in *McNemar* affirmed the District Court's application of judicial estoppel as a per se bar). However, in *Krouse v. American Sterilizer Co.*, 126 F.3d 494, 503 n. 5 (3rd Cir. 1997), the Third Circuit stated that *McNemar* was a fact specific holding and an individual's claim is not always barred because of prior representations or determinations of disability. *See also Talavera v. School Board of Palm Beach County*, 129 F.3d 1214, 1218 (11th Cir. 1997) ("Taking into consideration the *Krouse* Court's discussion of *McNemar*, it appears that no Court of Appeals has adopted the position that a plaintiff who has claimed total disability on a benefits application is per se estopped from claiming that he could work with reasonable accommodations under the ADA.")

strong that a prima facie case cannot be established under the ADA. *See McNemar v. The Disney Store, Inc.*, 91 F.3d 610, 619 (3rd Cir. 1996), *cert denied*, 117 S. Ct. 958 (1997) (Claimant stated that he was "unable to work."); *Dush v. Appleton Electric Co.*, 124 F.3d 957, 964-65 (8th Cir. 1997) (Claimant said she was "totally disabled" and "unemployable."); *Budd v. ADT Security Systems, Inc.*, 103 F.3d 699, 700 (8th Cir. 1996) (Plaintiff made representations about his physical inabilities which were completely at odds with an ability to perform the essential functions of his job.); *Weigel v. Target Stores*, 122 F.3d 461, 463, 469 (7th Cir. 1997) (Claimant represented she was "wholly unable to work."); *Weiler v. Household Finance Corp.*, 101 F.3d 519, 525 (7th Cir. 1996) (Weiler stated that she was "no longer able to work at HFC in any capacity."); *Kennedy v. Applause, Inc.*, 90 F.3d 1477, 1482 (9th Cir. 1996) (Claimant represented he was completely disabled for all work related purposes.); *August v. Offices Unlimited, Inc.*, 981 F.2d 576, 584 (1st Cir. 1992) (Plaintiff stated he was "totally and continuously disabled."). *See also Simon v. Safelite Glass Corp.*, 128 F.3d 68, 74 (2nd Cir. 1997). In short, the overwhelming majority of the circuit courts have upheld summary judgment in favor of an employer not because of the rote application of judicial estoppel, but because the claimant cannot factually overcome representations made when seeking disability benefits. *Id.*

If a claimant's representations are inconsistent, many courts apply judicial estoppel. *See McNemar v. The Disney Store, Inc.*, 91 F.3d 610, 619 (3rd Cir. 1996), *cert denied*, 117 S. Ct. 958; *Taylor v. Food World, Inc.*, No. 97-6017, 1998 WL

29638 (11th Cir. 1998); *Simon v. Safelite Glass Corp.*, 128 F.3d 68 (2nd Cir. 1997). Judicial estoppel protects the integrity of the court system because it prohibits parties from changing their representations to fit their audience. *See, e.g., McNemar,* 91 F.3d at 620 (Claimant not entitled to make false representations with impunity.); *Reigel v. Kaiser Foundation Health Plan of North Carolina,* 859 F. Supp. 963, 967-70 (E.D.N.C. 1994) (Claimant "cannot speak out of both sides of her mouth with equal vigor and credibility before the court."); *Fleck v. K.D.I. Sylvan Pools, Inc.*, 981 F.2d 107, 121 (3rd Cir. 1992), *cert. denied,* 507 U.S. 1005 (1993) (It goes without saying that one cannot casually cast aside representations, oral or written, in the course of litigation simply because it is convenient to do so.)

Other courts have been reluctant to apply judicial estoppel because they fear that doing so will create a per se rule which always bars an ADA claim following receipt of Social Security benefits. *See Griffith v. Wal-Mart Stores, Inc.*, No. 96-6361, 1988 WL 29870 (6th Cir. 1998); *Blanton v. Inco Alloys International Inc.*, 123 F.3d 916 (6th Cir. 1997) (Court implies that judicial estoppel creates a per se bar). That concern is misplaced. Judicial estoppel, when applied correctly, bars a claim only when a claimant's representations are inconsistent. *See Simon v. Safelite Glass Corp.*, 128 F.3d 68, 73 (2nd Cir. 1997) ("If the statements can be reconciled there is no occasion to apply an estoppel."); *Taylor v. Food World, Inc.*, No. 97-6017, 1998 WL 29638 (11th Cir. 1998) (Judicial estoppel did not bar ADA claim because assertions were not inconsistent). Therefore, before applying judicial estoppel, a court must first determine whether a claimant's representations are inconsistent. *Id.* If the assertions in the particular case are

not inconsistent, they will not bar an ADA claim. *Id.; see also McNemar v. The Disney Store, Inc.*, 91 F.3d 610, 617 (3rd Cir. 1996), *cert. denied,* 117 S. Ct. 958 (1997) (Judicial estoppel is applied "with a recognition that each case must be decided upon its own particular facts and circumstances.")

Regardless of whether judicial estoppel was applied, the courts have consistently examined the facts of each case to determine whether the ADA claimant could establish a prima facie case. *Compare August v. Offices Unlimited, Inc.*, 981 F.2d 576, 584 (1st Cir. 1992) (Summary judgment upheld because representations of total disability precluded claimant from establishing he could perform the essential functions of his job.), *with D'Aprile v. Fleet Services Corp.*, 92 F.3d 1, 5 (1st Cir. 1996) (Summary judgment improper because representations not inconsistent.). *See also Dush v. Appleton Electric Co.*, 124 F.3d 957, 963 (8th Cir. 1997) (Without utilizing the doctrine of judicial estoppel, the court stated that an ADA claimant's prior representations of total disability normally carry sufficient weight to uphold summary judgment against the ADA claimant.) Because the Circuits agree that an individual factual evaluation is essential, a decision by this Court will not lessen the burden on lower courts. The decisions of lower courts show the proper analysis for cases such as this is understood – each case must be examined and the individual assertions reviewed in context.

II. The Fifth Circuit's Holding is Reasonable and Appropriate.

The Fifth Circuit recognized the inconsistency of a claimant asserting complete disability and a resulting inability to work while, at the same time, alleging she had the ability to perform the essential functions of a job with a reasonable accommodation. *Cleveland v. Policy Management Systems Corp.*, 120 F.3d 516, 516. *See also McNemar v. The Disney Store, Inc.*, 91 F.3d 610, 618 (3rd Cir. 1996), *cert. denied*, 117 S. Ct. 958 (1997) ("McNemar's statements on his disability benefits application are 'unconditional assertions as to his disability;' he should not now be permitted to 'qualify those statements where the application itself is unequivocal.' "); *Krouse v. American Sterilizer Co.*, 126 F.3d 494, 503 (3rd Cir. 1997) ("*McNemar* remains the law in this Circuit.") As the Second Circuit stated, the words "unable to work" are not words of art susceptible of being misunderstood. *See Simon v. Safelite Glass Corp.*, 128 F.3d 68, 74 (2nd Cir. 1997).[14]

The Fifth Circuit also examined the differences between the ADA and the Social Security Act. The court noted that the SSA considers some conditions to be presumptively disabling. *Cleveland*, 120 F.3d at 517. Further, the SSA does not consider whether the individual can work with reasonable accommodation.[15] *Id.* at 517-18. The

[14] The Second Circuit did not address whether judicial estoppel would preclude a claim under the ADA. *Simon*, 128 F.3d at 74.

[15] Although Cleveland contends that PMSC had a duty to reasonably accommodate her, "the duty of reasonable accommodation does not encompass a responsibility to provide a disabled employee with alternative employment when the employee is unable to meet the demands of his present position." *Myers v. Hose*, 50 F.3d 278, 284 (4th Cir. 1995). *See also* 42 U.S.C. § 12111(9)(B) (1995); 29 C.F.R. § 1630.2(o)(2)(ii) (1997). No reasonable accommodation is required – or even possible – when Cleveland was admittedly disabled and unable to do her job.

court also observed that the SSA has a trial work program which recognizes that some individuals may qualify for Social Security disability benefits while they are able to work. *Id.* at 517. Sensitive to the fact that a claimant could be both disabled under the Social Security Act and capable of performing the essential functions of his job, the Fifth Circuit rejected a per se rule which would automatically prohibit Social Security recipients from establishing an ADA claim. *Id.* at 517. In order to preserve judicial integrity and the integrity of the Social Security program, both of which depend on truthful participation, the Fifth Circuit adopted a reasonable, common sense standard that allows a claimant to pursue both Social Security disability benefits and ADA protection in an appropriate case. The Fifth Circuit's approach does not automatically bar ADA claims after application and receipt of Social Security disability benefits. *Cleveland*, 120 F.3d at 518. The application and receipt of benefits, however, creates a rebuttable presumption that a claimant, such as Cleveland, is not a qualified individual with a disability. *Id.* at 518. If the claimant comes forward with evidence that he is both capable of performing the essential functions of his job and disabled, the receipt of disability benefits will

not preclude his ADA claim. *Id.* This approach harmonizes the legislative intent of both the ADA and the SSA.

In the present case, Cleveland repeatedly and unambiguously represented to the SSA that she became "unable to work on January 7, 1994," and that she is "disabled." (R.II 394-397). She represented "I had a stroke in January 1994, I went back to work but I couldn't work" and "I could no longer do my job because of my disability." (R.II 417, 421). Her medical providers stated that she is "100% disabled" and "permanently and completely disabled from any productive work." (R.II 75, 314). Cleveland's assertions were deliberate. For example, she told the Texas Rehabilitation Commission that she was there "[t]o get my disability." (R.II 421). When asked why she had applied for disability benefits, she responded "I had a stroke in January 1994. I went back to work but I couldn't work." (R.II 421). Moreover, Cleveland made consistent, unambiguous representations under penalty of perjury that she was disabled and unable to work beginning January 7, 1994. (R.II 394-434); *Cleveland*, 120 F.3d at 518. Cleveland never told the SSA that her disability began, or grew worse, after her termination from PMSC. (R.II 56-386). As a result, an administrative law judge found that Cleveland became disabled beginning January 7, 1994 and awarded Social Security disability benefits retroactive to that date. (R.II 434); *Id.* at 515. Therefore, based upon Cleveland's unambiguous, consistent representations of disability which were made under penalty of perjury, the Fifth Circuit appropriately held that her assertions created a rebuttable presumption, one she did not rebut, that she could not simultaneously perform the essential functions of her job. *Id.* at 517.

Cleveland's uncorroborated and self-serving summary judgment evidence was insufficient to overcome her own previously, uncontradicted sworn statements. *Id.* at 518-19.

In criticizing the Fifth Circuit, Cleveland heavily relies on *Swanks v. Washington Metropolitan Transit Authority*, 116 F.3d 582 (D.C. Cir. 1997). *See* Petition pp. 14-20. The *Swanks* court acknowledged that the statements supporting disability claims are relevant in ADA suits. *Swanks*, 116 F.3d at 587. The D.C. Circuit, however, did not review Swanks assertions:

> . . . [t]he record contains no evidence of Swanks's position before the Social Security Administration; we know nothing about what he said in his application for Social Security disability benefits, what evidence he provided to support his claim, or what statements he or any of his witnesses made in the course of the proceedings.

Id. at 587. In short, since the *Swanks* court did not have enough facts to presume the existence of inconsistent statements, it could not reasonably and responsibly grant summary judgment.

Further, *Swanks* cited, with approval, *Pyramid Securities Ltd. v. IB Resolution, Inc.*, 924 F.2d 1114, 1123 (D.C. Cir. 1991), "holding that parties' prior sworn statements must be given 'controlling weight' at summary judgment unless 'the shifting party can offer persuasive reasons for

believing the supposed correction.' "[16] Thus, under the D.C. Circuit's analysis, Cleveland's sworn representations would be given "controlling weight" and she would have been required to offer persuasive reasons for believing the supposed correction. *Id.* at 1123. The Fifth Circuit properly found that Petitioner's previously uncontradicted sworn representations were not overcome by her "supposed correction." *Cleveland,* 120 F.3d at 518. Because the *Swanks* court was unable to analyze the representations Swanks made to the SSA, it is pure speculation for Petitioner to assume what the D.C. Circuit would hold if presented with the representations made in the present case. The D.C. Circuit, like other Circuits, rejected a per se bar in favor of an individual review of the claimant's sworn assertions within the factual context of each case to determine whether she has produced sufficient evidence to overcome summary judgment. *Swanks,* 116 F.3d at 587.

The Fifth Circuit's holding is essentially the same reasonable approach adopted by the Seventh and Eighth Circuits. *Compare Cleveland,* 120 F.3d at 518 *with Weigel v. Target Stores,* 122 F.3d 461 (7th Cir. 1996)[17] *and Dush v.*

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[16] In *Pyramid Securities Ltd.,* the court also noted that "the objectives of summary judgment would be seriously impaired if the district court were not free to disregard the later testimony." *Id.* [Citations omitted]

[17] Cleveland asserts that *Weigel* supports her position. Petition at p. 18. The *Weigel* court upheld summary judgment for the employer on facts which are virtually identical to the facts of the present case. In *Weigel,* the claimant represented that she was unable to work and her doctor said that she was "totally disabled" from her job or "any other work." *Weigel,* 122 F.3d at

Appleton Electric Co., 124 F.3d 957 (8th Cir. 1997). All three Circuits have declined to adopt a per se bar and appropriately place great significance on the claimants' sworn representations. *See Cleveland,* 120 F.3d at 517. In *Weigel,* the court stated,

> [t]he point here is a simple one: when employees (and/or their physicians) represent that they are 'totally disabled,' 'wholly unable to work,' or some other variant to the same effect, employers and factfinders are entitled to take them at their word; and, such representations are relevant evidence of the extent of a plaintiff's disability, upon which an employer may rely in attempting to establish that an ADA plaintiff is not a 'qualified individual with a disability.'

Weigel, 122 F.3d at 467-68. Similarly, in *Dush,* the Eighth Circuit stated, "[w]here, as here, the party opposing the motion has made sworn statements attesting to her total disability and has actually received payments as a result of her condition, the courts should carefully scrutinize the evidence she marshals in an attempt to show she is covered by the ADA." *Dush,* 124 F.3d at 963.

As in the Fifth Circuit, claimants in the Seventh and Eighth Circuits must produce evidence to overcome their

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463. The court concluded that Weigel's position that she could have worked and her doctor's affidavit that "there was a good chance Shirley Weigel could have returned to her position at Target. . . . " were insufficient to overcome summary judgment. *Id.* at 468-69. Likewise, Cleveland's claim that she could have worked and Dr. Herzog's contention that he expected a full recovery, cannot overcome the consistent and unambiguous sworn representations of Cleveland's inability to work.

previous inconsistent representations. *Cleveland*, 120 F.3d at 517; *Weigel*, 122 F.3d at 468; *Dush*, 124 F.3d at 964. The *Weigel* court noted that a claimant is free to come forward with additional evidence that shows she could perform the essential duties of the desired position. *Weigel*, 122 F.3d at 468; *see Dush*, 124 F.3d at 964 ("Dush has not come forth with 'strong countervailing evidence that she was, in fact, qualified.' ") (quoting *Mohamed v. Marriott International, Inc.*, 944 F. Supp. 277, 282 (S.D.N.Y. 1996)). Likewise, in the Fifth Circuit, a claimant can come forward with evidence to rebut the presumption that he is unable to perform the essential functions of his job. *Cleveland*, 120 F.3d at 517. Petitioner failed to do so. *Id.* at 518. Therefore, summary judgment was appropriate.

The Fifth, Seventh and Eighth Circuits agree that, as a general rule, summary judgment against the ADA claimant can be appropriate. *Cleveland*, 120 F.3d at 518-19; *Weigel*, 122 F.3d at 468 ("As a general matter . . . absent some such affirmative showing of the plaintiff's ability to perform the essential functions of the position, there will be no genuine issue of material fact as to whether the plaintiff is a 'qualified individual' and the employer will be entitled to judgment as a matter of law."); *Dush*, 124 F.3d at 963 ("Typically, the prior representations of total disability carry sufficient weight to grant summary judgment against the plaintiff.") (quoting *Mohamed v. Marriott International, Inc.*, 944 F. Supp. 277, 281-84 (S.D.N.Y. 1996)). Accordingly, the Seventh and Eighth Circuits sustained summary judgment in favor of the employer on facts similar to those in the present case. *Weigel*, 122 F.3d at 468; *Dush*, 124 F.3d at 964.

By factually analyzing each case, the Circuits are merely requiring a claimant to be honest. If the claimant is disabled and cannot work, he may be entitled to Social Security disability benefits. If he can work, then the ADA prohibits employment discrimination. The Circuits recognize that a claimant may, in certain circumstances, be entitled to Social Security disability benefits and be a qualified individual with a disability. A claimant should not, however, be allowed to make whatever representations are necessary to obtain Social Security disability benefits and then receive money from his former employer when he was admittedly so disabled that he could not work. Congress limited the ADA to those who can perform the essential functions of their job. *See* 42 U.S.C. § 12111(8) (1995). "To rule otherwise might leave the implication that someone who feels himself in need of further income is free to misrepresent important information to the Social Security Administration." *Simon v. Safelite Glass Corp.*, 128 F.3d 68, 72 (2nd Cir. 1997).

Here, Cleveland engages in hyperbole by suggesting that the opinion in this case, and other similar opinions, will nullify the ADA and exclude from its protections for all time all who have ever sought Social Security disability benefits. Petition pp. 9-13. That is not the case. In fact, the Fifth Circuit chose an analytical framework which avoids any "per se" rule which might have the effect on the ADA that Cleveland fears. The application for Social Security disability benefits only gives rise to a rebuttable presumption that judicial estoppel should apply. Therefore, it is the nature of the representations made in the application, together with other evidence a claimant may muster, which determines whether the presumption has

effect or is rebutted. *See Cleveland*, 120 F.3d at 517. Where, as here, the claim for benefits is based upon clear, consistent and unequivocal representations of disability, and no credible admissible evidence contradicts those representations, the presumption of judicial estoppel arising from the inconsistent claims applies and the later claim based upon an alleged ability to perform the essential functions of the claimant's job fails. *See id.*

That is not to say the presumption of judicial estoppel can never be rebutted. For example, if the Fifth Circuit were deciding the facts in *Taylor v. Food World, Inc.*, No. 97-6017, 1998 WL 29638 (11th Cir. 1998), where the claimant's mother told the SSA that the claimant needed "supervision, structure, and routine" but never stated that he could not perform his job, the presumption would likely be rebutted. *See Cleveland*, 120 F.3d at 517. Similarly, if the claimant has a condition which automatically qualifies him for benefits, such as a brain tumor,[18] but he never represents that he is completely disabled or unable to work, the presumption is likely rebutted. *Whitbeck v. Vital Signs, Inc.*, 116 F.3d 588, 591-92 (D.C. Cir. 1997) (Court overturned summary judgment in part because claimant had a listed impairment which automatically entitled her to Social Security disability benefits.). As the Fifth Circuit recognizes, the disability supporting the Social Security claim may be such that the claimant is nonetheless able to perform the essential functions of his job. Accordingly, the Fifth Circuit's holding insures that a

[18] *See* 20 C.F.R. § 404, Subpt. P, App. 1 (1997); 20 C.F.R. § 404.1525 (1997).

claimant honestly represents the nature of his condition to the SSA without foreclosing ADA protection.

CONCLUSION

The Circuit Courts which have considered the issue unanimously agree that representations a claimant makes when applying for and receiving disability benefits are relevant in deciding whether he can establish a prima facie case under the ADA. The courts consider the content of the claimant's representations in the factual context of each case. If the claimant's representations are inconsistent with his position that he can perform the essential functions of his job, some courts use judicial estoppel to guard against judicial inconsistencies, while others reach the same conclusion without specifically invoking the doctrine. Regardless of labels, each court, like the Fifth Circuit, considers whether the claimant can overcome his previous representations. In the present case, the Fifth Circuit has adopted a reasonable approach holding that a claimant's application or receipt of Social Security disability benefits creates a rebuttable presumption that he cannot perform the essential functions of his job. A claimant can overcome the presumption; therefore, receipt of Social Security disability benefits is not an absolute bar to ADA protection. This approach protects the integrity of the courts and the Social Security application process, furthers the goals of both statutes, and establishes an orderly and reasonable method for

resolving seemingly inconsistent claims. Therefore, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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